

## **PRACTICE AND PROCEDURE MANUAL**

### **SENIOR U. S. DISTRICT JUDGE THOMAS A. WISEMAN, JR.**

#### **I. Brief Biography**

Judge Thomas A. Wiseman, Jr. was appointed by President Carter in 1978. He served as Chief Judge from 1984 through August 1991, and took senior status in November of 1995. He received his B.A. and J.D. degrees from Vanderbilt University in 1952 and 1954 respectively, and an L.L.M. from University of Virginia in 1990. He served in the Tennessee House of Representatives from 1965 through 1968 and was State Treasurer from 1971 through 1974.

#### **II. Preliminary General Matters**

##### **A. Scheduling**

Scheduling should be undertaken with Shari Tipton, Judge Wiseman's Courtroom Deputy, (615) 736-5081.

##### **B. Correspondence with Court**

Judge Wiseman prefers that all matters be communicated to the Court in pleadings, notices, memoranda, and briefs. If letters are absolutely necessary, the parties should be aware that they will be filed in the Clerk's Office.

##### **C. Telephone Conference with Court**

Telephone conferences may be arranged for pretrial matters not referred to the magistrate judge. He has no problem with these when out-of-town lawyers are involved. In fact, he has conducted a TRO hearing with one of the lawyers present only by telephone.

##### **D. Telephone Conference with Law Clerks**

Telephone conferences with Judge Wiseman's law clerks are allowed concerning the administration, but not the merits, of any case.

##### **E. Motion to Ascertain Status**

The proper procedure varies with the type of motion and its urgency. If it is an urgent matter, if there is a pending court date or if the motion involves a time period of importance, you may call the Court's secretary (Nancy Duckwiler, (615) 736-7013) or courtroom deputy or you may file a motion to ascertain status. Otherwise, no inquiry is welcomed until more than 90 days after the motion is ripe for consideration; i.e., more than 90 days has passed from the date after all briefing and argument is complete. After this 90 day period has expired, an inquiry or motion to consider status of case is appropriate.

### **III. Pretrial Matters - Civil Cases**

Please note that Judge Wiseman refers all eligible cases to the U.S. Magistrate Judges for Customized Case Management pursuant to Rule 11 of the Local Rules of Court. However, the following information generally applies to all civil cases exempt from Customized Case Management or not in referral status to the Magistrate Judges.

#### **A. Scheduling Orders**

As long as both sides agree, most items in a scheduling order can be altered, with the exception of the trial date. As long as the parties are actually working on preparing the case, even the trial date can be moved by agreement of counsel with the concurrence of the Court. Any proposals to change the trial date must be checked with the courtroom deputy. He suggested that lawyers be considerate of the Court, and let the courtroom deputy know of any proposed changes as much in advance as possible.

#### **B. Continuances and Extensions**

##### **1. General Policy**

If lawyers are candid with each other and the Court, and if it does not appear that movant is merely trying to delay, continuances are generally granted.

##### **2. Requests**

All requests should be made in writing. A status conference or hearing on the motion should be requested, if desired by counsel.

#### **C. Pretrial Motions**

##### **1. Referral to Magistrate Judge**

He generally does not send discovery motions to a magistrate judge for resolution. Personally deciding these matters helps him know more about cases he is going to try. On another note, however, Judge Wiseman expressed disappointment that parties so seldom consent to a magistrate judge trial. He stated that we have bright magistrate judges, and parties can get a quicker and more certain trial date with less trial interruptions.

##### **2. Oral Argument**

When requested by the parties, Judge Wiseman will grant oral argument if he feels it would be beneficial. He will order it sua sponte if he feels some issue is not adequately addressed in the briefs. When a hearing is ordered, it is typically scheduled for the next available date by the courtroom deputy. If counsel have conflicts on the scheduled date, they should contact the courtroom deputy after receiving the order or case notice. All the courtroom deputies are conscious of the judges' desire to accommodate counsel on such matters.

### **3. Briefs**

He dislikes wordiness and likes brevity. Briefs should get to the point as quickly as possible. He does not mind additional briefs after the parties' initial briefs have been filed as long as something new is raised.

### **4. Chamber Copies of Filings**

Judge Wiseman does not want extra copies of filings; however, if a party is filing a last-minute pleading (the day before or the day of a hearing, for example), a **"courtesy copy" of the filing should be delivered directly to chambers.**

### **5. Proposed Orders**

He does not have a problem with this, but generally prefers to write "granted" or "denied" at the end of the motion paper, which is just as easy as reviewing and signing the proposed order.

## **D. Discovery**

### **1. Discovery Period and Extensions**

Agreed orders are usually granted. Other extensions that don't affect the trial date are ordinarily granted. Requests that extend the trial date may require conferences.

### **2. Interrogatories**

#### **(a) Number Limit**

Judge Wiseman has a liberal policy toward discovery, and that generally applies to interrogatories in excess of the Local Rules limit. However, before ruling, he wants to review the proposed interrogatories to make sure they are not oppressive and harassing. Interrogatories are the first volley in discovery to determine the location of witnesses and documents. Parties should try to stay within the Local Rule limit, and that is one step lawyers can take toward cutting the costs of litigation. If a case is complex, he will take that into consideration, but in the past he has denied motions to serve additional interrogatories.

#### **(b) Instructions and Definitions**

He has no problem with such prefatory matters and has never had a question concerning them come up in his court.

#### **(c) Objections**

Objections to discovery as over-broad or unduly burdensome may be sustained if the party can show that the requested discovery is only very remotely relevant, and it is pretty obviously so. All his decisions on such questions depend upon the facts, and are basically ad hoc.

### **3. Resolution of Discovery Disputes**

Judge Wiseman does not like discovery disputes. In ruling on such motions, he will grant costs to the prevailing party because Rule 37 requires it. The amount of the award is in his discretion.

### **4. Confidentiality Agreements**

Judge Wiseman is concerned that there is a conflict between the public's right to know and the incentive to settle cases by keeping the settlement confidential. He will make a case by case determination.

### **5. Expert Witnesses**

The Court will consider pretrial motions in limine on the expert's qualifications. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993); Judge Thomas A. Wiseman, Jr., Judging the Expert, 55 Ohio St. L. J. 1105 (1994) (discussing Judge Wiseman's philosophy on expert testimony)

## **E. Settlement**

All settlement conferences will be assigned to another district judge or magistrate judge. Judge Wiseman believes this is the only way for lawyers to be candid with the settlement judge and for the trial judge not to be influenced by what he has heard at the settlement conference.

## **F. Pretrial Briefs**

### **1. Form**

The pretrial brief is the last thing Judge Wiseman will read before the case begins. It should briefly state the facts, the issues, the legal bases of the claims, anticipated evidentiary problems and authorities.

### **2. Scope in non-jury case**

The pretrial brief should include more emphasis on contested issues of fact and supporting proof anticipated than in jury case.

### **3. Scope in jury case**

The pretrial brief should set out issues to be submitted to the jury and those the Court will have to decide.

## **G. Pretrial Orders**

### **1. Form**

An agreed proposed pretrial order should be jointly prepared by the parties and submitted to the Court no later than the time of the pretrial conference. The proposed order should contain a short summary of plaintiff's theory; a short summary of defendant's theory; the issues to be submitted to the judge or jury;

any procedural issues; a statement that the pleadings are amended to conform to the pretrial order and that the order supplants the pleadings; and a statement that counsel have complied with the requirements regarding the exchange of witness lists, exhibit lists, expert witness statements, depositions which are expected to be offered into evidence, etc.

## **2. Submission to the Court**

If the pretrial order is agreed upon and no disagreements remain as to requested stipulations or authenticity of exhibits, plaintiff's counsel shall state within the pretrial order that no pretrial conference is necessary and submit it to the Court prior to the pretrial conference date. It will then be stricken from the Court's calendar by the courtroom deputy.

## **H. Injunctions**

### **1. Scheduling**

The Court will set the preliminary injunction hearing within ten days of the issuance of the temporary restraining order.

### **2. Expedited Discovery**

The Court will allow expedited discovery if a case is made for it by written motion.

## **IV. Pretrial Matters - Criminal Cases**

### **A. Suppression Hearings**

The Court will schedule in advance of trial if possible, but sometimes the suppression hearing will be set on the morning of the trial.

### **B. Motions**

Motions should be made in writing and supported by briefs or affidavits.

### **C. Pretrial Conferences**

It is unusual to conduct a pretrial conference in a criminal case, but the Court will do so on request.

## **V. Trial Procedure**

### **A. Scheduling**

Trials generally will run from 9 a.m. to 12 p.m. and from 1 p.m. to 5 p.m. Tuesdays through Fridays.

### **B. Out-of-Town parties, witnesses, or attorneys**

The Court will try to accommodate such persons.

### **C. Motions in Limine**

Judge Wiseman encourages these motions, even if he does not rule on them before trial, since they alert him to evidentiary issues.

### **D. Courtroom Decorum**

Lawyers may move about the courtroom as they like. Counsel may also hand documents directly to witnesses without first passing them to the marshal.

### **E. Voir Dire**

Judge Wiseman's method of jury selection is to put enough potential jurors in the jury box initially to equal the number of jurors to be seated plus the number of peremptory challenges. For a two or three day civil trial, a seven person jury might be selected, with each party having four strikes. Therefore, assuming this trial has one plaintiff and one defendant, about fifteen prospective jurors are initially placed into the box. Voir dire will begin with questioning by Judge Wiseman, and then he will allow counsel to question the prospective jurors. At the conclusion of the questioning, the judge will direct counsel to exercise their challenges. If both sides strike the same person, it counts against both, and more than seven persons may be left on the jury. If this occurs, the seven persons with the lowest numbers in ascending order as seated in the box will make up the jury.

### **F. Note Taking by Jurors**

Judge Wiseman allows jurors to take notes during trial. The jurors may take their notes into the jury room during deliberation, but are not allowed to take them home at night during the progress of the trial.

### **G. Opening Statements**

#### **1. Length**

Judge Wiseman has no time limits. Usually, however, opening statement is completed by the noon break on the first day of trial. Less often, opening statements will not be completed until after the noon break. He stated that counsel do not abuse voir dire or opening statement in his court. He has on occasion called counsel to the bench during voir dire to state that the lawyer was wearing out his/her welcome. Judge Wiseman likes opening statement and believes it can be very effective.

#### **2. Use of Exhibits**

Counsel should not use any exhibits that are known from the pre-trial order or a pending motion in limine to be objectionable. Otherwise, exhibits may be used. Judge Wiseman believes that use of exhibits in opening statements is part of telling the jury what the proof is going to be.

### **H. Side Bar Conferences**

Ask for them and requests will be granted. Don't abuse the privilege.

## **I. Videotaped Testimony**

Judge Wiseman likes it in preference to sterile depositions read to the jury.

## **J. Deposition Reading**

You may ask another lawyer to read the part of the witness if you desire. It helps to separate questions from answers.

## **K. Exhibits**

Judge Wiseman likes exhibits to be pre-labeled using the Court's own exhibit stickers, yellow for plaintiff and blue for defendant. During the trial, the Courtroom Deputy will assign the exhibit numbers sequentially, with the first exhibit introduced by plaintiff being assigned as Plaintiff's Exhibit No. 1, and so forth. The first exhibit introduced by defendant will be assigned as Defendant's Exhibit No. 1, and so forth. However, if the number of exhibits is very large, the Court may allow the exhibits to be numbered in advance. Copies of the exhibit list should be furnished to the Court, the courtroom deputy, the court reporter and opposing counsel at the beginning of the trial. Jurors may be furnished with individual copies of exhibits, provided counsel alert Judge Wiseman in advance. Lawyers should contact the courtroom deputy prior to trial in regard to the pre-marking of exhibits.

## **L. Witness Lists**

Witness lists should be provided to the Court, the courtroom deputy, the court reporter and opposing counsel at the beginning of the trial.

## **M. Motions for Judgment as a Matter of Law or for Judgment of Acquittal**

Such motions should be made at the appropriate time during the trial pursuant to Rule 50 of the Federal Rules of Civil Procedure and Rule 29 of the Federal Rules of Criminal Procedure.

## **N. Proposed Jury Instructions and Verdict Forms**

Judge Wiseman likes to receive copies of proposed Jury Instructions and special verdict forms where there are unusual issues or questions. There is no need to submit standard requests. He will furnish counsel copies of his proposed instructions and verdict forms before closing argument, and a charge conference will be held. The judge asks counsel to provide proposed jury instructions to the court in two formats: (1) printed on paper and filed as a pleading in the Clerk's Office and; (2) on computer disk in WordPerfect (Windows or DOS), if possible, and submitted directly to the judge's chambers.

## **O. Proposed Findings of Fact and Conclusions of Law**

Judge Wiseman does not require findings of fact and conclusions of law in jury cases. He may require them to be submitted in non-jury cases, if appropriate, and especially if the case is lengthy. FFCL submitted after a trial should include citations to the transcript. Judge Wiseman tries to rule from the bench at the conclusion of non-jury trials as much as possible, and reserves the right to supplement his decision in writing at a later date. He does not generally require that FFCL be submitted prior to trial.

## **P. Offers of Proof**

When proof is excluded from jury consideration, offer of proof for appellate review may be made. In order not to delay the trial, the opportunity for this may be made during a break, at lunch or at the end of the day.

## **Q. Jury Deliberation**

### **1. Copy of Instructions**

A copy of the instructions is provided to counsel before closing arguments and, most often, a charge conference is held. A copy of the completed charge is given to each juror, and it may be taken into the jury deliberation room by the juror.

### **2. Access to Exhibits**

The trial exhibits are always taken to the jury in the deliberation room immediately upon their retirement.

### **3. Access to Transcript of Testimony or Videotaped Testimony**

This happens only on the request of the jury, and then such a request is rarely granted. To do so results in over-emphasis of parts of the testimony.

### **4. Availability of Counsel**

During jury deliberation, counsel must advise the courtroom deputy where they may be reached in case of a verdict or question from the jury.

### **5. Taking the Verdict and Special Interrogatories**

Judge Wiseman reads the verdict and special interrogatories to the jury and asks them if they concur.

### **6. Polling the Jury**

Judge Wiseman almost always polls the jury.

### **7. Interviewing the Jury**

He will allow attorneys to talk to the jurors after a verdict upon request from counsel or sua sponte. In case of a hung jury in a criminal case, he will ask the jurors what their vote was.

## **VI. Sentencing in Criminal Cases**

Judge Wiseman follows the district's Speedy Trial Plan and the U.S. Sentencing Guidelines.



## **VII. Other Comments**

-- Rule 37 Sanctions. He does not like discovery disputes, and that appears to be well known as not many are filed in his court. In ruling on such motions, he will grant costs to the prevailing party because Rule 37 requires it. The amount of the award is in his discretion.

-- Telephone Depositions. He favors these as a cost saving device. He also encourages lawyers to use non-stenographic recording of depositions for the same reason. In a telephone deposition, the oath can be administered by the Court reporter or notary via telephone to the witness.

-- Closing Argument. He imposes no time limit on closing. He also stated that whether a lawyer's expression of his personal opinion in closing is objectionable depends upon the context. Phrases such as "I think" and "I believe" may merely be figures of speech; if the lawyer injects himself into the deliberations of the jury, however, that is improper.

### **-- Responsibility of Local Counsel.**

(1) Purpose. Judge Wiseman likes local counsel and wants to continue that practice. Local counsel have an ongoing relationship with the Court which is beneficial in promoting candor and mutual respect.

(2) Trial Responsibility. The Bar needs to examine the question of limited authority of local counsel, and he is open to suggestions.

(3) Rule 11 Sanctions. The local counsel situation is going to get "sticky" under Rule 11. Resolution of many of these questions will involve plowing new ground. Whether local counsel can avoid Rule 11 sanctions by having their names typed on pleadings under the designation "of counsel" rather than actually signing the pleadings is open to question.

-- Pre-Trial Conference. If an agreed pre-trial order is submitted to Judge Wiseman prior to the scheduled date of the pre-trial conference, the conference will be stricken from the calendar as being unnecessary. If, however, there are disputes as to the authenticity of exhibits, pending motions in limine, or other matters that counsel wish to bring to the Court's attention prior to trial, counsel should contact the courtroom deputy so that the pre-trial conference will not be canceled.

-- Submissions Under Seal. Matters submitted under seal obviously have to be opened and viewed by the trial judge. He suggests that the envelope should bear the inscription "maintain under seal pending consideration by trial judge" or similar language as instructions to the clerk's office. A pleading will not be "under seal" unless Judge Wiseman orders it so. Unless he orders a document sealed or there is a statute requiring it to be sealed, it will be available to the public.

-- Agreed Orders. He routinely signs these except when trial continuances are involved.